TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 239.

WILLIAM R. REAGAN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 31, 1900.

(17,700.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 30, 1900.

In the Court of Claims.

WILLIAM R. REAGAN
vs.
THE UNITED STATES. } No. 20915.

I. Petition filed October 13, 1897.

II. Amended petition filed by leave of court October 27, 1899, which is as follows:

To the honorable the Court of Claims:

The claimant, William R. Reagan, respectfully represents:

I. That he was on the 25th day of April, 1893, appointed by the United States court for the Indian Territory United States commissioner within said Territory, under the provisions of section 39 of an act of Congress approved May 2, 1890, chapter 182, (1st Supplement to Revised Statutes, page 737), and has ever since remained such officer.

II. That he continuously performed the duties and received the salaries of said office until the 31st day of January in the year 1896, when the following order or notice was made and entered upon the records of the United States court in the Indian Territory, in the southern district, by the Honorable Constantine B. Kilgore, judge of said court:

To Hon. W. R. Reagan, United States commissioner for the fourth commissioner's district in and for the southern district of the Indian Territory.

SIR: I feel it my duty to declare the office of commissioner in that district vacant, and to notify you that you are no longer United States commissioner for that district and that your successor will be named at once.

There are many reasons which I could assign for my action in this behalf, but I will only suggest one now; that is your age and the infirmities incident thereto render you, in my judgment, in many respects unfit for the office."

III. That by section 4 of an act of Congress, approved March 1st, 1895, chapter 145, (2d Supplement to Revised Statutes, page 394), it was provided as follows in regard to United States commissioners in the Indian Territory:

"That the present commissioners shall be included in that number and shall hold office under their existing appointments, subject to removal by the judge of the district where said commissioners reside, for causes prescribed by law."

That upon the 1st day of March, 1895, the claimant was one of the present commissioners, then holding office under an existing appointment.

IV. That the aforesaid order does not constitute any statement of cause prescribed by law, sufficient under the terms of the aforesaid act of 1895, to warrant his removal.

V. That the claimant protested that said order was insufficient to effect his removal under the statute aforesaid, and duly served such protest upon the Hon. Constantine B. Kilgore, judge of said court, through the United States attorney for the southern district of the Indian Territory; that he thereupon sent two deputy marshals together with one John R. Williams, who had been by him designated as United States commissioner in the claimant's place, to take possession forcibly of the claimant's office and books as United States commissioner. That the claimant refused to turn over said office or papers or to recognize the said John R. Williams as his successor in said office, excepting so far as he was compelled thereto by the exercise of superior force on the part of the deputy marshals aforesaid, and the said Williams; that on the 10th day of February, 1896, the claimant and the said John R. Williams joined in the following instrument of writing:

"DUNCAN, INDIAN TERRITORY, }
Southern District. }

This instrument of writing witnesseth,

That, whereas, C. B. Kilgore, judge of United States court for the southern district of the Indian Territory, on the 31st day of January, A. D. 1896, made, and caused to be entered upon the docket of his court at Ardmore, Ind. Terr. an order declaring my office for United States commissioner for the Ryan division, of said district, vacant: and at the same time appointing John R. Williams to be my successor in said office, and the said Reagan having appealed to the courts of the United States from said order, on the ground that said order is contrary to the law,

Now, therefore, it is agreed by and between the parties hereto, that said Reagan will turn over and surrender the dockets, books and papers belonging to said office, under protest, and that said Williams received the same, with the understanding that said Reagan yields no rights by so doing, that he would otherwise have.

Witness our hands this 10th day of Feb'y, A. D. 1896.

JNO. R. WILLIAMS.
WM. R. REAGAN.

Witnesses:

____ ____.
____ ____."

VI. That by a provision of section 4 of the act of March 1st, 1895, the claimant was entitled to receive a salary of fifteen hundred dollars per annum, and received such salary up to the 31st day of January, 1896; that since said date, although he has continued to hold said office, he has not been paid said salary, or any part thereof, and there is justly due to this claimant for salary
3 aforesaid, from the 1st day of February, 1896, to 31st day of September, 1899, the sum of five thousand three hundred and seventy-five dollars.

No other action than as aforesaid has been had on this claim in Congress or by any of the departments.

The claimant is the sole owner of this claim and the only person interested therein; and no assignment or transfer of this claim, or of any part thereof or interest therein, has been made.

The claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimant is a citizen of the United States, and the claimant believes the facts as stated in this petition to be true. And the claimant claims the sum of five thousand three hundred and seventy-five dollars ($5,375).

WILLIAM B. KING,
Attorney for Claimant.

DISTRICT OF COLUMBIA, *ss:*

William B. King, being duly sworn, deposes and says: I am the attorney for the claimant in this case. I have read the above amended petition, and the matters therein stated are true to the best of my knowledge and belief.

WM. B. KING.

Subscribed and sworn to before me this 27th day of October, 1899.

S. A. TERRY,
[SEAL.] *Notary Public.*

4 III.—*Traverse. Filed October* 24, 1899.

Now comes the Attorney General, on behalf of the United States, and, answering the amended petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the said amended petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

L. A. PRADT,
Assistant Attorney General.

5 IV.—*Findings of Fact, Conclusions of Law, and Opinion. Filed January* 15, 1900.

Findings of fact.

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts to be as follows:

I.

The claimant was, on the 25th day of April, 1893, appointed by the United States court for the Indian Territory United States com-

missioner within said Territory, under the provisions of section 39 of an act of Congress approved May 2, 1890, chapter 182 (1st Suppl. Rev. Stat., 737), and upon the 1st day of March, 1895, the claimant was one of the present commissioners, then holding office under an existing appointment. On April 17, 1895, the following order was entered of record in the United States court in the Indian Territory, southern district:

"It appearing from the records of this court that the said William R. Reagan was a duly appointed, qualified, and acting commissioner for the United States court for the third judicial division of the Indian Territory, located at Chickasha, on the 1st day of March, 1895, it is hereby ordered that in accordance with the act of Congress approved March 1, 1895, the said William R. Reagan be, and he is hereby, continued in office, and the bond hereinbefore recited be, and the same is, in all things approved and confirmed.

"C. B. KILGORE, *Judge.*"

II.

He continuously performed the duties and received the salary of said office until the 31st day of January in the year 1896, when the following letter was entered upon the records of the United States court in the Indian Territory, in the southern district, by the Hon. Constantine B. Kilgore, judge of said court:

"IN CHAMBERS,
"ARDMORE, INDIAN TERRITORY, *January 31st*, 1896.

"Hon. William R. Reagan, United States commissioner for the fourth commissioner's district in and for the southern district of the Indian Territory.

"SIR: I feel it my duty to declare the office of commissioner in that district vacant and to notify you that you are no longer United States commissioner for that district, and your successor will be named at once.

"There are many reasons which I could assign for my action in this behalf, but I will only suggest one now, that is, your age and the infirmities incident thereto render you, in my judgment, in many respects unfit for the office.

"Very respectfully, your obedient servant,

"C. B. KILGORE,
"*Judge U. S. Dist. Court, S. Dist.*"

The letter was not sent to the claimant or served upon him. No other statement of cause was made. The claimant was given no notice of any charge against him. No hearing was allowed the claimant and no opportunity to submit proof in his defense.

III.

The claimant protested that said letter was insufficient to effect his removal, and duly served such protest upon the Hon. Constantine B. Kilgore, judge of said court.

IV.

On February 10, 1896, one John R. Williams, who had been designated by said judge as United States commissioner in the claimant's place, came to claimant's office with two armed deputy marshals, and, presenting his order of appointment, demanded possession of the dockets, books, and papers belonging to claimant's office as United States commissioner.

6 V.

The order of appointment of said Williams is as follows:

"IN CHAMBERS,
"ARDMORE, INDIAN TERRITORY, *January* 31*st*, 1896.

"John R. Williams, a resident of Ryan, southern district of the Indian Territory, is hereby appointed United States commissioner in and for the fourth district of the sourthern district of the Indian Territory.

"Said appointment to take effect at once.

"It is further ordered that said commissioner shall reside at Ryan, and that he shall hold court at Ryan and at the town of Duncan in said district until further ordered, the time to be divided so as to dispose of the business at both points, which time shall be determined upon hereafter.

"C. B. KILGORE,
"*Judge U. S. Ct., So. Dist.*"

VI.

The claimant protested and refused to recognize said Williams as his successor in said office, excepting so far as he was compelled thereto by the exercise of superior force on the part of the deputy marshals aforesaid and said Williams. Thereupon the claimant and said Williams joined in the following instrument of writing:

"DUNCAN, INDIAN TERRITORY, }
"*Southern District.* }

"This instrument of writing witnesseth:

"That whereas C. B. Kilgore, judge of the United States court for the southern district of the Indian Territory, on the 31st day of Jan'y, A. D. 1896, made, and caused to be entered upon the docket of his court at Ardmore, Ind. Ter., an order declaring my office of United States commissioner for the Ryan division of said district vacant; and at the same time appointing John R. Williams to be my successor in said office, and the said Reagan having appealed to the courts of the United States from said order, on the ground that said order is contrary to the law:

"Now, therefore, it is agreed by and between the parties hereto that said Reagan will turn over and surrender the dockets, books, and papers belonging to said office under protest, and that said Williams receives the same with the understanding that said Reagan yields no rights by so doing that he would otherwise have.

"Witness our hands this 10th day of Feb'y, A. D. 1896.
"JNO. R. WILLIAMS.
"WM. R. REAGAN."

VII.

The claimant received a salary of $1,500 per annum up to the 3d day of February, 1896, but since said date has not been paid said salary or any part thereof.

VIII.

Claimant took no other or further action to assert his claim to said office or to obtain a reversal of the action of Judge Kilgore until the institution of this proceeding.

IX.

From the 3d day of February, 1896, until the 7th day of October, 1897, John R. Williams, who was appointed by Judge Kilgore to said office in claimant's stead, exercised said office and was paid the salary thereof. On said date one Horace M. Wolverton was appointed as the successor of said John R. Williams by Hon Hosea Townsend, United States judge for said district, and since that time has exercised said office and has been paid the salary thereof.

X.

From the 3d day of February, 1896, until the commencement of this action, the disbursing clerk of the department of justice paid to the persons who succeeded claimant to said office the salary of said office in the absence of any notice on the part of claimant that he claimed to be lawfully entitled to said office and the salary thereof, or any claim or demand on the part of claimant for the payment to him of such salary for said period of time or any part thereof.

Conclusion of Law.

Upon the foregoing findings of fact, the court decide, as a conclusion of law, that the petition be dismissed.

7 HOWRY, *J.*, delivered the opinion of the court:

This action is for the recovery of a certain amount of salary alleged by plaintiff to be due to him as United States commissioner for the Indian Territory, by virtue of an original appointment to that office under section 39 of the act of May 2, 1890 (1 Supp. R. S., 737), and his reappointment to the same office under a subsequent act approved March 1, 1895 (2 Supp. R. S., 394), but from which office plaintiff was removed by an order of the judge of the court for the division in which he was serving as commissioner without any cause prescribed by law. The amount sued for is $5,375, being at the rate of $1,500 for each year, beginning at the time plaintiff surrendered the office under protest to the person named as his successor.

On January 31, 1896, the following order or notice was made and entered upon the records of the United States court for the Indian Territory, in the southern district thereof, by the Hon. Constantine B. Kilgore, judge of said court:

"To Hon. W. R. Reagan, United States commissioner for the fourth commissioner's district in and for the southern district of the Indian Territory.

"SIR: I feel it my duty to declare the office of commissioner in that district vacant, and to notify you that you are no longer United States commissioner for that district, and your successor will be named at once.

"There are many reasons which I could assign for my action in this behalf, but I will only suggest one now; that is, your age and the infirmities incident thereto render you, in my judgment, in many respects unfit for the office.

"Very respectfully, your obedient servant,

"C. B. KILGORE."

When knowledge of this order was brought to plaintiff's attention he protested that it was insufficient to effect his removal under the law, and he accordingly made protest to the judge through the United States attorney for the district of his action. Thereupon John R. Williams, who had been designated as commissioner in plaintiff's place, came to take possession forcibly of the office and books of which plaintiff was possessed as commissioner, being accompanied by two deputy marshals for the purpose of enforcing the order of the judge. Plaintiff refused to turn over said office or papers, or to recognize his successor in said office, but finally yielded to the exercise of superior force, joining with his successor in an agreement duly reduced to writing, by which the books and papers of the office were surrendered to the person designated by the judge as successor, the removed official yielding with the understanding that no rights were waived by him.

Since the time named in the petition plaintiff alleges that he has not been paid any part of the salary justly due to him, nor has he attempted to perform any of the duties of the office, but he maintains that he has legally continued to hold said office and is entitled to its emoluments.

Section 4, of the act of March 1, 1895, which increased the number of commissioners, is in the following language:

"That the present commissioners shall be included in that number and shall hold office under their existing appointments, subject to removal by the judge of the district where said commissioners reside, for causes prescribed by law."

The contentions here arise from the use of the words "for causes prescribed by law" in the foregoing act, the claimant contending (1) that these words require notice and a hearing before the order of removal could become effective; and (2) that the letter of removal having stated no cause prescribed by law, plaintiff's title to the office was not affected by the order.

The case is one of first impression under a very peculiar statute and presents some novel features. Precedents directly in point are entirely wanting and the issues must be determined without those guides which relate to other officers where the right to hold against an order of removal is the question.

If plaintiff's contentions are correct, then his indefinite tenure of office has been nominal and attended with no responsibilities or duties; and while the defendants should not be heard to say that by the unlawful act of one of their officers plaintiff has not performed these duties or continued to have these responsibilities, it is to be noted that if the plaintiff has not been legally removed from office, the statute under which he claims gave him a tenure not accorded to his official superiors in the persons of the judges of the courts for the Indian Territory and virtually made him a commissioner for life. Practically he would hold except for such misbehavior as would be cause for the impeachment and removal of the judges of some of the courts of the United States. In this respect the statute under which he claims is most extraordinary if it be what is claimed for it.

8 Reversing the order of presentation of plaintiff's contentions, it is first to be stated that there are no causes defined by any statute of the United States for the removal of commissioners in the Indian Territory. The researches of counsel have not been able to exhibit to us any statute designating causes for such removals, nor have our own investigations enabled us to find any rule on the subject. The act of 1895 contains nothing more specific than the general words quoted, and nothing more definite has since that time been enacted.

It is contended that if a cause is found against a commissioner in the Indian Territory which would, within the laws of Arkansas, have been cause for the removal of a justice of the peace the commissioner may then be removed; otherwise, protected by this provision of the statute, he is not subject to removal by the courts of the United States.

By section 31 of the act of 1890, *supra*, the laws of the State of Arkansas, appearing in Mansfield's Digest, are put in force in the Indian Territory according to the chapters relating to different subjects specified in this section.

By section 39 commissioners were authorized to be appointed, and when appointed to have within the district to be designated in the order of court appointing them all the powers of commissioners of the circuit courts of the United States. The provisions of chapter 91 of said laws of Arkansas regulating the jurisdiction and procedure before justices of the peace in Arkansas were extended over the Indian Territory.

By section 4 of the act of 1895 (28 Stat. L., 696) the provisions of chapter 45 of Manfield's Digest of the general laws of Arkansas, entitled "Criminal Law" (except as to the crimes and misdemeanors mentioned in the proviso of this section), and chapter 46 of said laws of Arkansas contained in said digest, entitled "Criminal Procedure," and chapter 91 of said general laws, regulating the juris-

diction and procedure before justices of the peace in civil cases, were extended to and put in force in the Indian Territory.

The effect of this provision, according to plaintiff's contention, is to make the commissioners the equivalent of justices of the peace in Arkansas; that is to say (to state the matter in another form), that as no Federal statute prescribed specific causes for removal of commissioners, in order to find what causes are prescribed by law for their removal resort must be had to those causes defined by the laws of Arkansas for the removal of justices of the peace.

An examination of the criminal law and procedure of Arkansas extended to and put in force in the Indian Territory shows that Congress did not specifically apply to the removal of commissioners in the Territory the sole causes for which justices of the peace might be removed in Arkansas. The effect of the construction for which plaintiff contends would be to hold the commissioners in office for life unless some of the causes defined by the laws of Arkansas become operative upon them. Incapacity, old age, removal from one district into another, and reasons which might otherwise be regarded as good causes for removal, could not affect the commissioners under the laws of Arkansas, as those laws do not include the things just mentioned among the causes for removal. The reasons are clear. Justices of the peace are elected in Arkansas for terms of short duration. Their tenure of office being for two years only, Congress could not have intended to apply the rules applicable to the removal of elected officials in Arkansas within their short period of service to commissioners in the Indian Territory who held by appointments for uncertain and indefinite periods of time. The contrary view would be in restriction of the causes for removal to a degree not contemplated by Congress in any event.

What, then, is the meaning of the act of 1895 when it apparently attempted to differentiate the manner of removal of commissioners in the Indian Territory from the way commissioners in the circuit courts of the United States are usually removed?

On the surface it would seem very unreasonable to say that nothing was meant by this statute. Generally speaking, it is not for the courts to hold a statute meaningless if a reasonable construction can give meaning or force to its provisions. In the consideration of the particular statute in question it should, like all other statutes presumably enacted for a purpose, be given such meaning as its language fairly implies and to the full extent of the accomplishment of its supposed objects. But having no clear meaning for want of specific statutory prescription for causes of removal, the displacement of these commissioners (it is again contended) must either be referred by the act of 1895 to such causes as would be recognized in courts as a just ground for removal, or if no present effect be given to the words, removal must await legislative definition of the causes.

9 It would be an unsafe guide to follow if we should adopt the suggestion that the words of the act under construction refer to such causes as the courts, in the attempt to prescribe statutory causes, might recognize as just grounds for removal. What

would seem to be just grounds for removal by one court would perhaps seem to be unjust grounds by another tribunal, and the results such as to lead to uncertainty and confusion. No uniform rule could exist until the court of highest authority could lay down some certain cause or causes under the statute by which the inferior courts could be imperatively governed. But aside from this, the power "to prescribe by law" is a legislative function and cannot be conferred on judicial officers. (Exline *v.* Smith, 5 Cal., 112; Burgoyne *v.* Supervisors, 5 *Ib.*, 9.)

It seems most unreasonable, however, to say that Congress passed this law with the intention of making these territorial commissioners irremovable. Commissioners in other parts of the country are subject to removal and we cannot adopt the view that by this legislation it was the policy to keep those in the Indian Territory in office until the legislative function of naming the specific causes should at some future time follow the general statute. It cannot be ascribed to Congress the intention of defining causes by future legislation, thereby holding up the matter in continued derogation of ordinary judicial right. The words used do not say that commissioners shall be removed for causes *to be* prescribed, but for causes prescribed—that is, in the ordinary import of words, that the causes were already established by law. As the causes were not in fact already prescribed, we must view the act of 1895 as incomplete and importing nothing more than causes such as would, according to the practice of the courts (not purely arbitrary), operate to secure the removal of those officers elsewhere.

The question of the right of plaintiff to notice and a hearing is not involved unless the statute affords him that protection and right. As the statute does not do this, plaintiff must be regarded as subject to removal in the same manner as others of his class. All commissioners are quasi-judicial officers, who perform their duties under the direction of the courts, and in effecting their removal the courts are not bound to accord to them any higher or greater consideration than is accorded to auditors, referees, and receivers who may be removed without the formalities of a hearing and a trial. Their removal is not subversive of any fundamental principle of official tenure and responsibility as in those English cases where the right to hold the office was either by prescription or other fixed tenure, or those cases in this country where the official was in commission by virtue of an election by the people or for a fixed term by virtue of executive appointment and confirmation at the hands of an advisory body.

Where the statute gives a power of removal "for cause," without any specification of the causes, this power is of a discretionary and judicial nature, and unless the statute otherwise especially provides, the exercise thereof cannot be reviewed by any other tribunal, with respect either to the cause or to its sufficiency or extent, or otherwise. Even in some cases where the statute specifies the cause of removal it has been ruled that the removing authority is the sole and exclusive judge of the cause and the sufficiency thereof, and that the courts cannot review the decision in any case where juris-

diction existed. People *ex rel. v.* Stout, 11 Abb. Pr. (N. Y.), 17; S. C., 19 How. Pr. (N. Y.), 171; People *v.* Bearfield, 35 Barb., 254; Patton *v.* Vaughan, 39 Ark., 211; People *v.* Hill, 7 Cal., 97; City of Hoboken *v.* Gear, 25 N. J. L., 265; Smith *v.* Brown, 59 Cal., 672; People *ex rel. v.* Higgins, 15 Ill., 110.

This is not a case where the power of a judicial tribunal is invoked to ascertain and enforce the legal rights of an individual against the act or authority of other individuals or of the legislative or executive departments, but involves the function of deciding upon the validity of the removal by order of another judicial tribunal. If there was discretionary power in the judge, or if his act was made conclusive as to the right involved, as we think it was, it is not within the province of this court to inquire into the propriety or impropriety of the act.

These views render unnecessary any consideration of the question raised in the argument that payment of the salary of an office by a public body to a *de facto* officer is a defense to an action by a *de jure* officer for such salary; and that title to an office can be determined only in a direct proceeding instituted for that purpose and cannot be determined in an action to recover the salary thereof on any other collateral proceeding.

The petition is dismissed.

10 V.—*Judgment of the Court.*

WILLIAM R. REAGAN
vs.
THE UNITED STATES. } No. 20915.

At a Court of Claims held in the city of Washington on the 15th day of January, 1900, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the petition be dismissed.

BY THE COURT.

11 VI.—*Application for Appeal. Filed March* 22, 1900.

In the Court of Claims, Term 1899–1900.

WILLIAM R. REAGAN
vs.
THE UNITED STATES. } No. 20915.

Now comes the claimant and appeals from the judgment of this court dismissing his petition, rendered on the 15th day of January, 1900, and prays for an allowance of his appeal.

WILLIAM B. KING,
Attorney for Claimant.

VII.—*Allowance of Appeal.*

At a Court of Claims held in the city of Washington on the 22nd day of March, 1900, it was ordered that the foregoing application for appeal be allowed as prayed for.

BY THE COURT.

12 In the Court of Claims.

WILLIAM R. REAGAN
vs.
THE UNITED STATES. } No. 20915.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, the findings of fact by the court, the conclusions of law thereon, and the opinion of the court, of the judgment of the court, of the application for and allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 30th day of March, 1900.

[Seal Court of Claims.]

JOHN RANDOLPH,
Assistant Clerk, Court of Claims.

Endorsed on cover: File No., 17,700. Court of Claims. Term No., 239. William R. Reagan, appellant, *vs.* The United States. Filed March 31st, 1900.

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No. 939

Brief

IN THE

Supreme Court of the United States.

October Term 1900.

WILLIAM R. REAGAN, *Appellant*,
v.
THE UNITED STATES. } No. 239.

STATEMENT OF CASE, ASSIGNMENT OF ERROR AND ARGUMENT FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from the Court of Claims. The appellant claims salary as a United States commissioner for the Indian Territory. He was appointed under § 39 of the act of May 2, 1890 (26 Stat. L. 98; 1 Supp. R. S. 737), as follows:

"That the United States court in the Indian Territory shall have all the powers of the United States circuit courts or circuit court judges to appoint commissioners within said Indian Territory, who shall be learned in the law, and shall be known as United States commissioners; but not exceeding three commissioners shall be appointed for any one division, and such commissioners when appointed shall have, within the district to be designated in the order appointing them, all the powers of commissioners of circuit courts of the United States.

"They shall be *ex officio* notaries public, and shall have power to solemnize marriages.

"The provisions of chapter ninety-one of the said laws

of Arkansas, regulating the jurisdiction and procedure before justices of the peace, are hereby extended over the Indian Territory; and said commissioners shall exercise all the powers conferred by the laws of Arkansas upon justices of the peace within their districts; but they shall have no jurisdiction to try any cause where the value of the thing or the amount in controversy exceeds one hundred dollars."

By the act of March 1, 1895, § 4 (28 Stat. L. 695; 2 Supp. R. S. 394), the number of commissioners was increased, as follows:

"That each judge of said court shall have the powers conferred by law upon the United States circuit courts to appoint commissioners within the district in which he presides, who, at the time of their appointment, shall be duly enrolled attorneys of some court of record of the United States or of some State, and shall be competent and of good standing, and shall be known as United States commissioners, but not exceeding six commissioners shall be appointed for any district hereinbefore constituted:

"*Provided*, That the present commissioners shall be included in that number and shall hold office under the existing appointments, subject to removal by the judge of the district where said commissioners reside, for causes prescribed by law. The judge for each district may fix the place where, or the time when, each commissioner shall hold his regular terms of court.

"The order appointing such commissioners shall be in writing and shall be spread upon the records of one of the courts of the district for which they are appointed; and such order shall designate, by metes and bounds, the portion of the district for which they are appointed. They shall have all the powers of commissioners of the circuit courts of the United States.

"They shall be *ex officio* notaries public and *ex officio* justices of the peace within and for the portion of the district for which they are appointed, and shall have the power as such to solemnize marriages."

The claimant having been, on March 1, 1895, one of the "present commissioners" (Finding I, Rec. p. 4), was continued in his office and his title protected by the proviso of the act just quoted. He continued to discharge the duties of his office until January 31, 1896, when the following letter (Finding II, p. 4) was entered on the records of the United States court in the Indian Territory, for the southern district:

"IN CHAMBERS,

"ARDMORE, INDIAN TERRITORY, *January 31st, 1896.*

"Hon. William R. Reagan, United States commissioner for the fourth commissioner's district in and for the southern district of the Indian Territory.

"SIR: I feel it my duty to declare the office of commissioner in that district vacant and to notify you that you are no longer United States commissioner for that district, and your successor will be named at once.

"There are many reasons which I could assign for my action in this behalf, but I will only suggest one now, that is, your age and the infirmities incident thereto render you, in my judgment, in many respects unfit for the office.

"Very respectfully, your obedient servant,

"C. B. KILGORE,

"Judge U. S. Dist. Court, S. Dist."

The letter was not sent to the claimant or served upon him, no hearing was had and no opportunity permitting the claimant to defend himself. He made written protest to the judge on the court records. On the same day (p. 5) John R. Williams was appointed commissioner of the claimant's district and, on February 10, 1896, he came to the claimant's office with two armed deputy marshals and demanded possession of the office. The claimant protested, but was compelled by superior force to yield possession to said Williams, and they joined in an instrument (p. 5) by which the rights of the claimant were preserved.

The claimant asserts that the order of removal was not in accordance with the statute quoted—the proviso to § 4 of the act of March 1, 1895; he maintains that he still holds the office, although wrongfully prevented from exercising its duties, and he claims the salary of $1,500 a year, fixed by the act of March 1, 1895, § 4 (28 Stat. L. 690; 2 Supp. R. S. 395).

ASSIGNMENT OF ERROR.

For error, the appellant says that the Court of Claims erred in holding that the letter and acts set forth in the findings constituted a removal of the appellant from the office of a United States commissioner for the Indian Territory, and in rendering judgment against him for salary of said office since said wrongful removal.

ARGUMENT.

This case turns upon the effect of the proviso to § 4 of the act of March 1, 1895, already quoted:

"That the present commissioners shall be included in that number and shall hold office under the existing appointments, subject to removal by the judge of the district where said commissioners reside, for causes prescribed by law."

The claimant's positions are that the attempted removal is void because:

(1) The cause assigned for the action of the judge is not a "cause prescribed by law."

(2) The procedure adopted by the judge, by which the claimant was given no notice of any charge against him and no hearing, is contrary to the statute, which necessarily implies notice and hearing as a condition to removal.

The Protective Purposes of the Statute.

The purposes of this statute are apparent on its face, not only to continue the present commissioners in office, but to give them protection in their offices from arbitrary removal. Other commissioners may, in the absence of such protection, be summarily removed, as may civil officers in general not so protected (*Ex parte* Hennen, 13 Pet. 230; Parsons *v.* United States, 167 U. S. 324). These commissioners are unmistakably singled out for special treatment. The Court of Claims recognizes this fact in the following words:

"What, then, is the meaning of the act of 1895 when it apparently attempted to differentiate the manner of removal of commissioners in the Indian Territory from the way commissioners in the circuit courts of the United States are usually removed?

"On the surface it would seem very unreasonable to say that nothing was meant by this statute. Generally speaking, it is not for the courts to hold a statute meaningless if a reasonable construction can give meaning or force to its provisions. In the consideration of the particular statute in question it should, like all other statutes presumably enacted for a purpose, be given such meaning as its language fairly implies and to the full extent of the accomplishment of its supposed objects."

But the court is unable to find in the statutes any "causes prescribed by law" for the removal of commissioners and, notwithstanding the assertion of these sound principles, declares that it "views the act of 1895 as incomplete" and decides that the removal of this officer, in the manner set forth in the Findings, is in accordance with law.

No Cause Prescribed by Law Asserted.

It does not concern the claimant if there is difficulty in determining what is a cause prescribed by law. He

has a right to the office until some cause prescribed by law is found. No law, either statute or common, prescribes the cause alleged in the letter of removal. He consequently continues to hold the office for want of sufficient ground of removal. It is not his duty to point out what may be a cause prescribed by law; his position is purely defensive. Unless it is shown that the cause asserted is a cause prescribed by law, the order of removal is void. Nevertheless, he can suggest more than one meaning of the words in question which would permit a lawful removal on proper charges.

Future Designation of Causes.

The participle "prescribed" may refer to the future as well as to the past. "Causes prescribed by law" is a phrase not necessarily meaning causes heretofore prescribed. It may as well mean causes to be prescribed. Its full import is causes heretofore or hereafter prescribed. If the words have no present application, they must apply to causes prescribed by future act of Congress.

If it is impossible to find in existing law any cause prescribed for the removal of the Commissioners, then the statute so fixes the tenure of those commissioners that they are not subject to removal until Congress prescribes some cause for removal. The Court of Claims in its opinion says:

"It seems most unreasonable, however, to say that Congress passed this law with the intention of making these territorial commissioners irremovable. Commissioners in other parts of the country are subject to removal and we can not adopt the view that by this legislation it was the policy to keep those in the Indian Territory in office until the legislative function of naming the specific causes should at some future time follow the general statute."

Yet the intention of Congress to give these particular commissioners a tenure superior to those possessed by other commissioners is expressed on the face of the statute, however unreasonable such an intention may seem to the Court of Claims. "It would seem very unreasonable to say that nothing was meant by this statute"; but nothing else is meant than to give them a tenure better than other commissioners. This may seem unreasonable and perhaps, if the provision had been submitted to some other tribunal than Congress, it would not have been adopted; but so Congress expressed its will and it should not be nullified because courts may question the wisdom of it. It is perfectly within the power of Congress, at any time, to prescribe causes for removal or even to change the tenure of these commissioners.

This is the true, because it is the most obvious, construction of this law. The permanent tenure of a judicial officer is not so great an evil as one would infer from the opinion of the Court of Claims, nor is it so absurd a consequence that the court is justified in treating this statute as "incomplete and imperfect," because its most natural meaning leads to this consequence. Many wise thinkers do not think it so direful a consequence, that a judicial officer should be irremovable, as that he should be removable at the will of the appointing power. To this effect, indeed, was the view expressed by Justice Field, Justices Gray and Brown concurring, in the dissenting opinion in McAllister *v.* United States, 141 U. S. 191.

The manifest purpose of the words is that the cause for removal shall be one designated by Congress and not one designated by the judge. That being so plainly expressed and no present cause being designated by Congress, which interpretation better accords with it, (*a*) that the cause is to be hereafter designated by Congress or (*b*) that the cause may be designated by the judge?

Causes Found in Adopted Statutes.

An examination of the acts of 1890 and 1895 authorizing these commissioners suggests another and broader meaning to the words in question than this just asserted.

By § 31 of the act of 1890 (26 Stat. L. 94; 1 Supp. R. S. 733) the laws of the State of Arkansas appearing in Mansfield's Digest are put in force in the Indian Territory, according to chapters relating to different subjects specified in this section.

By § 39, commissioners are authorized, who shall exercise all the powers conferred by the laws of Arkansas upon justices of the peace and the provisions of chapter 91 of the same laws, regulating the jurisdiction and procedure before justices of the peace are thereby extended to the United States commissioners so created for the Indian Territory. By the act of 1895, § 4 (28 Stat. L. 696; 2 Supp. R. S. 395) these provisions are re-enacted and additional chapters of Mansfield's Digest, 45 and 46, "regulating the jurisdiction and procedure before justices of the peace in civil cases be, and they are hereby, extended to and put in force in the Indian Territory."

The effect of these provisions is to put the commissioners in the place of justices of the peace in Arkansas. Consequently, when the removal of the commissioners is forbidden except for "causes prescribed by law," the laws of Arkansas contained in the designated chapters of Mansfield's Digest may be examined, if there be no Federal statute prescribing cause for removal of commissioners, in order to find what causes are prescribed by law for the removal of justices of the peace from office. Such examination shows many causes for their removal.

By chapter 45, § 1911, a justice is to be removed for failure to proceed against a person carrying weapons.

By chapter 46, § 2324, a justice is excluded from office on conviction of bribery or felony.

By chapter 46, § 2325, he is to be removed upon conviction of malfeasance or misfeasance, or willful neglect of duty.

By chapter 64, § 3306, he is to be removed for a failure to keep a record of his fees or for refusing due access to such record.

By chapter 129, § 5874, any officer collecting State or County moneys and fraudulently stating an account is to be removed.

If a cause is found against a commissioner in the Indian Territory which would, within the laws of Arkansas, have been cause for the removal of a justice of the peace, he may then be removed. Otherwise, protected by this provision of the statute, he is not subject to the power of removal on the part of the United States court.

The Court of Claims overlooks apparently the provisions of § 2325 of Mansfield's Digest when it cites (p. 9) "removal from one district into another," among the wrongs which would not be cause for removal from office. The provisions of this section are broad enough to permit a very substantial power of removal, at the same time giving effect to the plain provision of the law protecting this claimant's tenure.

It was suggested in argument and considered in the opinion of the court below that "cause prescribed by law" may be such causes as have been recognized by courts as lawful causes for removal of a commissioner, such as habitual drunkenness, sitting in judgment in interested cases (*In re* Eaves, 30 Fed. Rep. 21) or the encouragement of prosecutions by professional witnesses (*In re* Gilbert, 31 Fed. Rep. 277). The position has merit and might be necessary under other conditions, but the two constructions already suggested seem more obvious and should be admitted in preference. But this position should be readily preferred to the nullification of the statute accepted by the Court of Claims.

Notice and a Hearing Required.

The Court of Claims has given no weight to the doctrine so well fortified by authority as to have become a rule of statutory interpretation that where an officer's tenure is dependent upon good behavior or where the power of removal is to be exercised only for cause, then the power must be exercised subject to the condition that charges are duly made, that notice of these charges is given to the accused officer, that a hearing is granted and that an opportunity is afforded to adduce evidence on his behalf. A long line of decisions both in England and in this country enforces this principle.

In Page *v.* Hardin (8 B. Mon. [Ky.], 648, 672), a case was presented of summary removal by the governor, of the secretary of the commonwealth who held his office during a fixed term "if he so long behaved himself well." The court thus expressed itself:

"The secretary being removable for breach of good behavior only the ascertainment of the breach must precede the removal. In other words, the officer must be convicted of misbehavior in office. And we shall not argue to prove that in a government of laws, a conviction whereby an individual may be deprived of valuable rights and interest, and may moreover be seriously affected in his good fame and standing, implies a charge and trial and judgment, with the opportunity of defence and proof. The law, too, prescribes the duties and tenure of the office and thus furnishes a rule for the decision of the question involved."

In Dullam *v.* Willson (53 Mich., 392) it appeared that the constitution of Michigan authorized the governor to remove an officer "for gross neglect of duty, or for misconduct in office, or any other misfeasance or malfeasance therein."

The governor removed the appellee summarily, saying—

"I have this day for your official misconduct and habitual neglect of duty removed you from the office of trustee of the Michigan Institution for the Deaf and Dumb; the reasons for such removal I shall lay before the Legislature at its next session in detail."

It was objected that the governor could not remove without "charges, notice and an opportunity for defense."

The court sustained this objection in these terms:

"Unless it is the manifest intention of the section under consideration that the proceedings should be *ex parte* as well as summary, a removal without charges, notice and an opportunity for defense can not be upheld. The exercise of such power, in such manner, would be too despotic for any attempt at vindication in a country which boasts of the utmost liberty compatible with the safety of the State, and is entirely opposed to the genius of our free institutions."

An exactly similar doctrine is held in Pennsylvania in the cases of Commonwealth *v.* Slifer (25 Pa. St. 23) and Field *v.* Commonwealth (32 Pa. St. 478, 481). In each of these cases removal of an officer for cause was authorized by law, and in each case it was held that notice, hearing and an opportunity for defense were necessary, although the statutes wholly failed to declare any limitation upon the power of the removing officer, except the existence of the facts constituting sufficient cause.

The same doctrine is also announced in the case of State *v.* St. Louis (90 Mo. 19). See also Appeal of Willard, 4 R. I. 595, 597.

One of the earlier English cases on this subject, relied upon in the Michigan case and others just cited, is Ramshay's case (18 Ad. & El. [N. S.] 172, 190). The statute gave power to the chancellor "if he shall think fit,

to remove for inability or misbehavior any such judge appointed or hereafter to be appointed." The court, by Campbell, C. J. said:

"The chancellor has authority to remove a judge of a county court only on the implied condition prescribed by the principles of eternal justice, that he hears the party accused; he can not legally act upon such an occasion without some evidence being adduced to support the charges; and he has no authority to remove for matters unconnected with inability or misbehavior in the office of county court judge. Where the party complained against has had a fair opportunity of being heard where the charges, if true, amount to inability or misbehavior, and where evidence has been given in support of them, we think we can not inquire into the amount of evidence or the balance of evidence, the Chancellor, acting within his jurisdiction, being the constituted judge upon this subject."

In the case of Queen *v.* Archbishop Canterbury (1 El. & El. 545), it appeared that, upon the revocation of a license to act as curate, an appeal was given to the Archbishop, "who shall confirm or annul such revocation as to him shall appear just and proper." It was held that the appeal could not be exercised merely upon examination of the petition for appeal and the original record before the bishop, but that an actual hearing upon the charges must be given upon the appeal.

A similar doctrine is announced in Capel *v.* Child (2 Crompton & Jervis, 558, 574) and in King *v.* Gaskin (8 T. R. 209).

The principle relied upon in all these cases is stated per Bayley, J. in Williams *v.* Bagot (3 B. & C. 781, 786)—

"It is contrary to common justice that a party should be concluded unheard."

and by Chief Justice Marshall in Meade *v.* Deputy Marshal (1 Brock. 324; 16 Fed. Cases, 1291)—

"It is a principle of natural justice, which courts are never at liberty to dispense with, unless under mandate of positive law, that no person shall be condemned unheard or without an opportunity of being heard."

It will be observed that none of the statutes in these cases contained any express requirement of notice or hearing; the courts uniformly held this to be implied in the express provisions for tenure during good behavior or against removal without cause.

This line of decisions establishes as a fixed principle of construction that if cause for removal is required it is not enough that a cause be stated by the removing power; unless notice of the charge is given and an opportunity for defense afforded, the order of removal is wholly void. That rule of interpretation, thus fixed in English-speaking jurisprudence, founded on its fundamental principles, salutary in its effect, should be upheld in this court until a direct legislative command changes the rule thus sanctioned.

Sound reasons for the rule are given in the opinions cited. It would, indeed, be a naked right, of no value, to declare that an officer should be removed only for cause and then to permit his removal summarily upon a mere allegation of cause without the substantial protection afforded by an opportunity to answer the charges. His position would be worse than under a statute permitting unlimited removal, for under such a statute he goes out because the superior power wills it and without charge against him, while under a statute like the present he would be publicly charged with and convicted of cause for removal without a chance to respond.

To require notice and hearing does not diminish the discretion granted to the removing power, since, as is seen by the decisions cited, no court has asserted a right to interfere with the decision of the removing power as

to the pertinency and weight of the evidence adduced at the hearing. The power to decide is left where granted by law, but it is to be exercised only under due forms of law.

On the reason and authority here given, the claimant contends that the summary letter of removal, although stating a ground for justification, is void, because no notice and hearing was given and that the claimant still holds the office and is entitled to its salary.

Defenses.

Some positions taken below by the defense may be anticipated in this brief.

There was no acquiescence on the claimant's part. He placed on the records of the court his protest against his removal and gave up his office to his *de facto* successor only upon the exhibition of force. His acts were open and public, of such a nature that the public, including the officers of the government resident in the Indian Territory, knew that he continued to claim the office. A commissioner wrongfully deprived of his office who enters a protest both to the judge who removes him and the commissioner who succeeds him can not be expected to do more in the way of notice before bringing suit for his salary.

The most actively urged defense is that payment to a *de facto* officer defeats the claim of a *de jure* officer to the salary of his office. Certain decisions are cited to sustain this doctrine. These are chiefly from the State of New York, Smith *v.* Mayor, 37 N. Y. 518; Dolan *v.* Mayor, 68 N. Y. 274, and McVeany *v.* Mayor, 80 N. Y. 185. These decide that, if a salary has been paid prior to the decision of an action to determine title to the office, the officer *de jure* can not recover from the municipality. If paid after such a decision, he may recover it. It is

also held that an officer *de jure* can recover from the officer *de facto* the salary paid him. These decisions are declared to be based on the principle that salary is compensation for services, although the last rule seems quite inconsistent with it. In the last case, the court used this language (p. 192):

"It was recognized (in Dolan *v.* Mayor, 68 N. Y. 274) that the salary is the compensation for the rendition of services."

The other cases cited follow the New York decisions but without any considerable amount of independent reasoning, placing their decision in general, as in Steubenville *v.* Culp, 38 Ohio St. 18, on the same ground, that salary is the reward for services and can not belong to one who could not perform the services.

This principle is just the opposite of that recognized in the Federal jurisdiction, where a suit in the Court of Claims has long been the method of trying a disputed title to public office. So far back as 1871, in Ware *v.* United States, 7 C. Cls. 565, the Court of Claims held that the absence of a clerk in one of the Executive Departments on account of sickness was no defense to his claim for pay, although the head of the Department directed the deduction. In Sleigh *v.* United States, 9 C. Cls. 369, the doctrine was declared and has never since been overturned either there or here, that the right to salary was dependent on the legal holding of the place for which the salary was granted and not upon the actual rendition of service. The court said (p. 375):

"The incumbent of an office is *prima facie* entitled to to the lawful compensation thereof so long as he holds the office, though he may be disabled by disease or bodily injury from performing its duties. If it be an office held at the will of the appointing power, and that power does not see fit to have the compensation go on while the in-

cumbent is so disabled, the only remedy, in the absence of express law or regulation authorizing the stoppage of the compensation during the disability, is to remove the incumbent and so end his right to compensation. If the appointing power suffers him to continue in office, notwithstanding the disability, he is entitled to the compensation. This right may be cut off by law or regulation authorizing it; but not by the act of the appointing power without the authority of law or regulation."

In Rush *v.* United States, 33 C. Cls. 417, the Court of Claims said of the right of letter-carriers to their salaries (p. 432):

"In other words, their right to such salaries depends upon their appointment and qualification for the discharge of the duties pertaining to their respective offices, which is wholly a matter of statute."

So clearly, indeed, has this doctrine, that a suit for the salary is the right mode of trying a disputed title to Federal office, been settled in this jurisdiction that in such cases as McAllister *v.* United States, 22 C. Cls. 318; 141 U. S. 174; Parsons *v.* United States, 30 C. Cls. 222; 167 U. S. 324; Keim *v.* United States, 33 C. Cls. 174; 177 U. S. 290, as well as in the earlier case of McElrath, 12 C. Cls. 214; 102 U. S. 426, it was not even suggested that payment to a *de facto* successor in office would have been a defense to the claim. In all these cases this defense might have been raised and, if decided for the United States, would have determined the case. That it was not discussed by counsel or by either court in any of these cases, shows that the practice in this jurisdiction is otherwise settled. This court has distinctly recognized this fact in the case of Wales *v.* Whitney, 114 U. S. 564. The appellant was an officer of the Navy, summoned before a court-martial. He attempted, by writ of *habeas corpus*, to test the jurisdiction of the court-martial. The court

held that he had no right to the writ and could defend before the court-martial itself upon the grounds asserted in his petition, adding:

"If that court finds him guilty, and imposes imprisonment as a part of a sentence, he can then have a writ to relieve him of that imprisonment. If he should be deprived of office, he can sue for his pay and have the question of the jurisdiction of the court which made such an order inquired into in that suit. If his pay is stopped, in whole or in part, he can do the same thing."

One reason why the New York doctrine does not obtain under Federal jurisdiction and can not obtain in this case is because no mode is provided for determining title to Federal office by a direct proceeding on the part of any private citizen. It was decided by this court in Wallace *v.* Anderson, 5 Wh. 291, that an information for a *quo warranto* could not be maintained except at the instance of the Government, even by the consent of the parties, and in Nebraska *v.* Lockwood, 3 Wall. 236, it was held that the territorial authorities could not bring such a writ, that being reserved for the United States alone. The claimant could not test the right of his successor to this office in any other way than by this suit.

Even in New York, the principle of these cases is much shaken by the decision in the case of Fitzsimmons *v.* Brooklyn, 102 N. Y. 536. The question discussed was whether money earned by the claimant during the time when not receiving salary from a municipality could be deducted in accordance with the rule in cases of master and servant. The court said:

"But this rule of damages has no application to the case of an officer suing for his salary and for the obvious reason that there is no broken contract or damages for its breach where there is no contract. We have often held that there is no contract between the officer and the

State or municipality, by force of which the salary is payable. That belongs to him, as an incident of his office, and so long as he holds it; and, when improperly withheld, he may sue for and recover it. When he does so, he is entitled to its full amount, not by force of any contract, but because the law attaches it to the office, and there is no question of breach of contract or resultant damages, out of which the doctrine invoked has grown."

This decision admits that salary is not a matter of contract, by which services are rendered by the officer and payment made for these services by the State; it declares that salary is an incident attached to the office by law. It is entirely inconsistent with this principle to hold that the payment of a salary to a person not entitled to it is a defense to a suit by the person to whom the office rightfully belongs.

The New York rule has been denied in California, Dorsey *v.* Smyth, 28 Cal. 21; Stratton *v.* Oulton, 28 Cal. 45; Carroll *v.* Siebenthaler, 37 Cal. 193; in Pennsylvania, City of Philadelphia *v.* Rink, 2 Atl. Rep. 505; in Tennessee, Mayor *v.* Woodward, 59 Tenn. 499; and in Maine, Andrews *v.* Portland, 79 Me. 484. In Michigan the New York rule was first rejected, Stadler *v.* Detroit, 13 Mich. 346, but later followed, Auditors *v.* Benoit, 20 Mich. 176. Judge Cooley, in a dissenting opinion in this case, made the best statement to be found in the reports of the ground for holding that a *de jure* officer is entitled to the salary of his office, even if it has been wrongfully paid to a *de facto* officer. He approves the decision of the California Court in Dorsey *v.* Smyth, 28 Cal. 21, saying:

"This decision seems to me to be sustainable on the strongest reasons of public policy. A wrong is done to society and to public order in every instance in which the usurpation of a public office takes place; and the rules of law ought to be such as to give the greatest

possible discouragement to such a proceeding. The county authorities, in a case like this ought not to be told that they may countenance the intrusion with impunity and deliver over to a usurper the emoluments of an office to which he has neither a legal nor a moral claim. Such a rule encourages usurpations and tends to lower the standard of public morality. Public policy requires that municipal officers should be allowed to sanction or recognize the intrusion only so far as may be necessary to give the public the full benefit of protection, which the rule regarding the acts of officers *de facto* was designed to afford."

The doctrine for which the United States contends is ill founded in reason; it has but little authority to support it; it has never been sustained in the Federal Courts. It can not now be a defense to this claim.

Conclusion.

The appellant asks a reversal of the judgment against him because:

(1) Congress has plainly expressed that his tenure of office should be protected from the arbitrary exercise of the power of removal.

(2) No cause prescribed by law was asserted by the judge in entering the order of removal, or has since been claimed to exist, although a removal without such cause is forbidden.

(3) In requiring a cause prescribed by law as a condition of removal, it is a settled rule of law that notice of charges and a hearing upon such notice is required before the removal may lawfully be made.

WILLIAM B. KING,
Attorney for Appellant.

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No. 239.

Brf. of Atty. Gen. (Pradt) for Appellee

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In the Supreme Court of the United States.

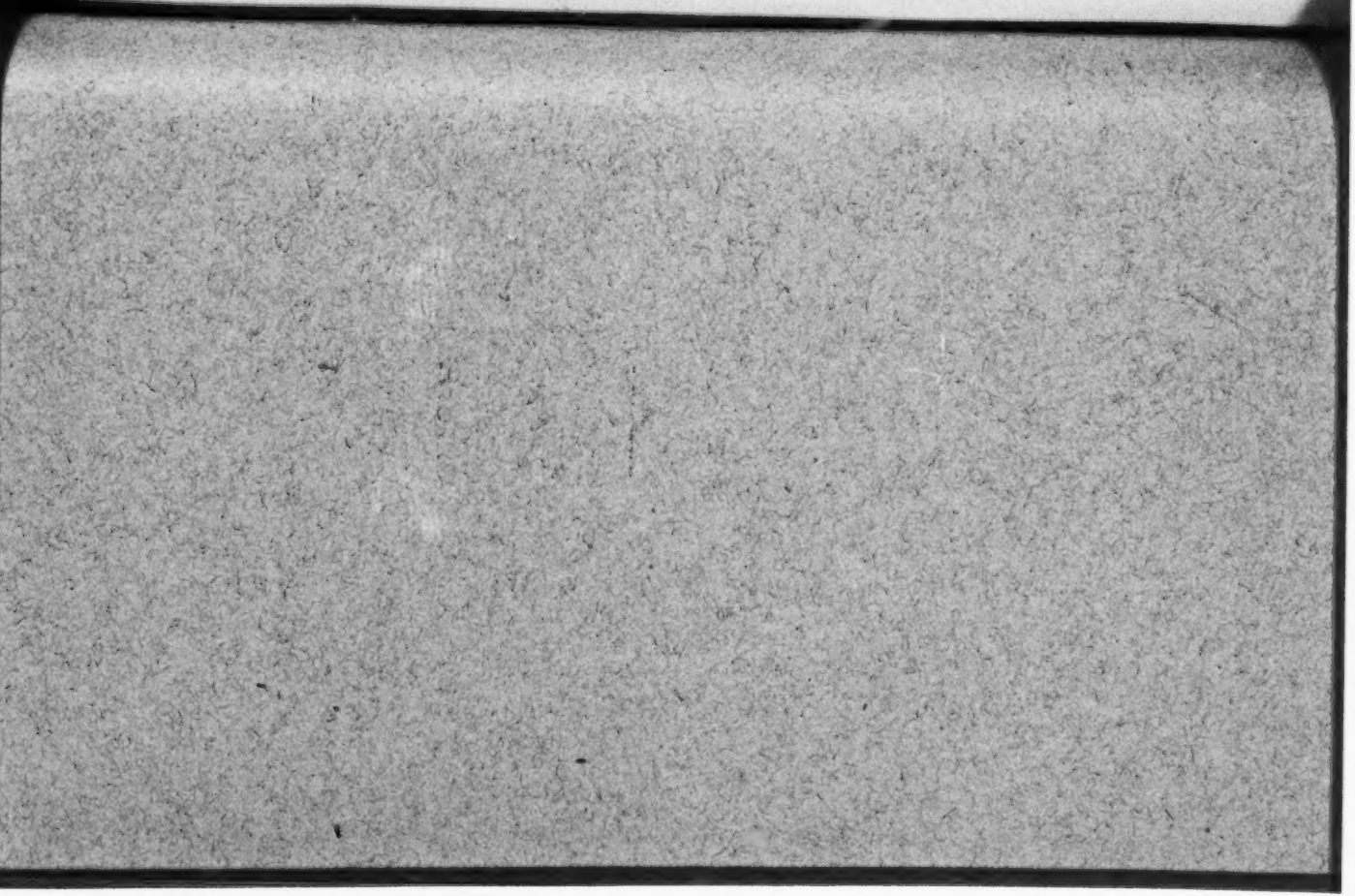
WILLIAM R. REAGAN, APPELLANT,
v.
THE UNITED STATES. } No. 239.

OCTOBER TERM, 1900.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEE.

L. A. PRADT,
Assistant Attorney-General.



In the Supreme Court of the United States.

OCTOBER TERM, 1900.

WILLIAM R. REAGAN, APPELLANT,
v.
THE UNITED STATES. } No. 239.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

The appellant was originally appointed a United States commissioner by the United States court for the Indian Territory, under the provisions of section 39 of the act of Congress approved May 2, 1890, chapter 182 (1 Suppl. R. S., 737), as set forth in appellant's statement. Subsequent thereto the act of Congress approved March 1, 1895, chapter 145 (2 Suppl. R. S., 392), was passed and the appellant was reappointed to the same office under the provisions of said act. By an order of the judge of the district where the appellant resided, entered January 31, 1896, the appellant was removed from office without notice of any charge against him and without hearing or opportunity to submit proof in his defense.

Section 4 of said act of March 1, 1895 (2 Suppl. R. S., 394), provides for the appointment of commissioners, as follows:

> That each judge of said court shall have the powers conferred by law upon the United States circuit courts to appoint commissioners within the district in which he presides, who, at the time of their appointment, shall be duly enrolled attorneys of some court of record of the United States or of some State, and shall be competent and of good standing, and shall be known as United States commissioners, but not exceeding six commissioners shall be appointed for any district hereinbefore constituted:

Said section then proceeds with the following proviso:

> *Provided*, That the present commissioners shall be included in that number and shall hold office under their existing appointments, subject to removal by the judge of the district where said commissioners reside, for causes prescribed by law.

The contention in this action arises upon the interpretation to be given to the foregoing proviso, the position of the appellees being that as no cause for the removal of a United States commissioner or a circuit court commissioner was "prescribed by law," that part of said proviso relating to removal is nugatory.

No cause for the removal of a commissioner in Indian Territory or a circuit court commissioner has ever been prescribed by any United States statute. The proviso of section 4 before quoted comprises all the legislation upon that subject. And so the law remains to-day, for

Congress has never seen fit to further legislate upon this matter.

In the absence of constitutional provision or statutory regulation the power of removal is incident to the power of appointment. (*Ex parte Hennan*, 13 Peters, 230, 258; *Parson's Case*, 167 U. S., 324; *United States* v. *Alred*, 155 U. S., 594.) This rule the appellant admits. No Constitutional provision exists. Under article 2, section 2, of the Constitution, Congress has vested the appointment of commissioners in the courts of law. Does the proviso of section 4 constitute a statutory regulation?

CONGRESS REFERRED TO EXISTING CAUSES OF REMOVAL.

When Congress provided for the removal of "the (then) present commissioners" "for causes prescribed by law," it had in contemplation causes which had been prescribed and were in existence at the time of the enactment of the statute. The past participle "prescribed" refers to past action—to action that had been already completed. In its ordinary sense it means something written before, something laid down beforehand, as a rule of action or a method of procedure. This is its natural meaning, and is the sense in which it is used in the vast majority of statutes wherein such a phrase as the one here or a like phrase is used. Legislatures are constantly enacting statutes providing that the procedure under them shall be "in the manner provided by law," "as prescribed by law," and phrases of like import, referring the execution of the statute to a system of procedure already made and provided by legis-

lative action. And there is nothing in the proviso to section 4 to indicate that any meaning other than the ordinary one is there intended. The apparent object of the proviso was to include "the (then) present commissioners" under the new appointments, and, in order to enforce such object, referred them to a protection which Congress supposed to be in existence at the time, but which in fact was not.

Section 3 of the act of March 3, 1825 (4 U. S. Stat., 115) provides that any offense committed in certain places the sites whereof are ceded to the United States, the punishment for which was not specially provided for by any law of the United States, shall, upon conviction, be liable to and receive the same punishment as the laws of the State wherein such place is situated "provide for the like offense when committed within the body of any county of such State."

In *United States* v. *Paul* (6 Peters, 141) the defendant was indicted, in 1830, under said statute for breaking and entering a store at West Point within the sole and exclusive jurisdiction of the United States. The store was not in any way identified with a dwelling, and the offense, therefore, was not burglary at common law, nor by the laws of New York as existing in 1825, but was created a burglary in the third degree by the Revised Statutes of New York going into operation in 1829. The defendant moved to quash said indictment upon the ground that the third section of said act is to be limited to the laws of the several States in force at the time of its enactment. The case came up to this court on a certificate of division from the circuit court.

Chief Justice Marshall stated the opinion of this court to be that the third section of the act of March 3, 1825, is to be limited to the laws of the several States in force at the time of its enactment.

The principle in said case is approved by this court in *Waring* v. *Clarke* (5 How., 476).

To sustain appellant's contention that "prescribed" should be read "*to be* prescribed," and that, therefore, the removal of a hold-over commissioner in Indian Territory must await legislative action, is to say that Congress provided a particular class of officers for the Indian Territory, the members of which generally should be removable at the will of the power appointing them, for section 4 leaves all the commissioners (except the hold-over commissioners) in that situation, and that it then by the proviso selected out of that class certain members thereof who should hold office during good behavior, i. e., during life, or at least until Congress at some future time should state causes subjecting them to removal, a thing Congress might or might not do, and which it has not yet done.

The language of the act does not authorize such a constrained and unnatural construction. Had Congress intended such commissioners to hold office during good behavior, it would have declared so clearly. If it had intended to relegate the matter of removal to some future time, indefinite and uncertain, it would have done so in language framed to leave no doubt of such intention. It would have used language importing futurity, as in the California constitution hereinafter referred to. And in the absence of such intention

clearly and unequivocally expressed, it is an unwarrantable and unreasonable construction to ask a court to say that Congress had intended to so legislate in derogation of the ordinary rights of the judiciary and in violation of all legislative precedent. Especially is this true where the language of the act has a clear, plain meaning, offering so little for construction as section 4 of the act of 1895.

In *Lyman* v. *Grammercy Club* (50 N. Y. S, 1004), the supreme court of New York lays down this doctrine in the following language:

> There is a presumption against an intention on the part of the legislature to infringe upon the province of the judicial department of the Government, and to devest the court of any of its essential powers, or to forbid the exercise of such powers in particular cases; and any construction leading to such a result must be avoided if possible. Such an intention must be expressed in clear and unequivocal terms. There must be express negative words, or the implication must be necessary and irresistible. It is supposed that the legislature would not make so important an innovation without a very explicit expression of its intention.

TO PRESCRIBE LOOKS TO LEGISLATIVE ACTION, NOT TO JUDICIAL INTERPRETATION.

To prescribe, in the sense here used, is to proclaim the legislative will. It is a lawmaking power and belongs to the legislature. It may be delegated in a degree as to courts to prescribe rules of court, and even then is not judicial, but administrative. But it is no

part of the judicial power to prescribe laws, rules of action, or causes which may become the bases of claims of right or exemption on behalf of parties. The duty of the judiciary is to decide upon rights under the rules laid down by the lawmaking power.

The words "prescribed by law" look to legislative action and not to judicial interpretation. Such has been the holding of courts in this country where the question has been presented to them.

The constitution of California (art. 1, sec. 3) provides:

> The right of trial by jury shall be secured to all, and remain inviolate forever, but a jury trial may be waived by the parties, in all civil cases, in the manner to be prescribed by law.

In the case of *Exline* v. *Smith* (5 Cal., 112) the court in interpreting this provision say (Murray, C. J.):

> The words "prescribed by law" used in the constitution look to actual legislation upon the subject, and in no just sense can be construed into a permission for the exercise of this power by others. * * * Besides, the power to "prescribe by law" is legislative, and can not be conferred on judicial officers.

The same principle is maintained in *Burgoyne* v. *Supervisors* (5 Cal., 9). See also *Sloan* v. *Gibson* (4 Mo., 32).

The constitution of Missouri (art. 6, sec. 27), in establishing the circuit court of St. Louis County, provides:

> The judges of said circuit court may sit in general term for the purpose of making rules

> of court, and for the transaction of such other business as may be provided by law.

This section was interpreted by the court in the case of the *State ex rel. Lionberger* v. *Tolle* (71 Mo., 647), the syllabus of which is:

> The power given to the judges of that court in section 27 to transact "such other business as may be provided by law," includes the performance of such duties pertaining to judicial business as the legislature may deem it necessary for the judges to perform with a view to the efficient administration of justice or the protection of the rights of litigants and others who are to be affected by legal proceedings.

The court (Hough, J.) say:

> The power to make rules of court conferred by the twenty-seventh section of the constitution above cited is itself not strictly a judicial power. Acts done by courts under rules established by themselves are of course judicial in their nature; but to prescribe a rule of action properly belongs to the law-making power. To decide upon the rights of parties under a rule prescribed belongs to the judicial power.

CONGRESS DID NOT REFER CAUSES OF REMOVAL TO ARKANSAS STATUTES.

In his brief the appellant enumerates such of the chapters of the laws of the State of Arkansas contained in Mansfield's Digest and put in force in the Indian Territory as he considers to be pertinent to the issue in this case, but I can not find that chapters 64 and 129 mentioned in said brief were ever so put in force.

The effect of these provisions, according to appellant's contention, is to make a "(then) present commissioner" in Indian Territory the equivalent of a justice of the peace in Arkansas; that when the removal of such commissioner is forbidden, except for "causes prescribed by law," and no Federal statute prescribes specific causes for removal, we must look to the laws of Arkansas prescribing causes for the removal of a justice of the peace, and that if a cause is found against such commissioner in Indian Territory, which by the laws of Arkansas would have been a cause for the removal of a justice of the peace, he may then be removed; otherwise, protected by this proviso, he is not subject to removal by the courts of the United States.

The practical effect of appellant's construction would be that one of "the (then) present commissioners" in Indian Territory could be removed only for conduct which would be a cause for impeachment of the judges of the highest courts of the United States, or he would hold office during good behavior; in other words, for life. Such commissioner once appointed would have it in his power to remain in office for life. No cause, however good and sufficient in itself, could affect him, unless it was specified in those laws of Arkansas made applicable to Indian Territory.

That such an interpretation can not be put upon this proviso seems to have been settled by this court. A commissioner is one of those inferior officers whose appointment is vested by Congress in the courts of law under Article II, section 2, of the Constitution, and he

or the like officer in all other jurisdictions of the United States, has always been considered in the same light as a master in chancery and a register in bankruptcy (*United States* v. *Alred*, 155 U. S., 591.)

In *Ex parte Hennan* (13 Peters, 230), the court say (p. 258):

> All offices, the tenure of which is not fixed by the Constitution, or limited by law, must be held either during good behavior, or (which is the same thing in contemplation of law) during the life of the incumbent; or must be held at the will and discretion of some department of the Government and subject to removal at pleasure. It can not for a moment be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment.

In the recent case of *Parsons* v. *U. S.* (167 U. S., 324) this court affirmed said principle, and held it to be the right of the President to remove an officer at his discretion although the term of office may have been limited by the words of the statute creating the office. The cases of *McAllister* v. *U. S.* (141 U. S., 174) and *Keim* v. *U. S.* (177 U. S., 290) also sustain the principle of removal at will by the appointing power.

While the statute confers upon commissioners in Indian Territory the powers of justices of the peace and provides that the practice and procedure before them shall be that of Arkansas, it nowhere prescribes that they or "the (then) present commissioners" shall be removed for causes which the Arkansas law provides in the cases of justices of the peace in that State. It is true that some of the Arkansas criminal laws made applicable to Indian Territory, as a consequence of conviction of certain public offenses, add the cumulative penalty of removal or exclusion from office. (Chap. 45, secs. 1911, 2324, 2325, Mansfield's Digest.) It is also true that a justice of the peace is removable for other causes defined by other laws of Arkansas, which other laws were not made applicable to and are not laws of the Indian Territory. (Chap. 64, sec. 3306; chap. 129, sec. 5874, Mansfield's Digest.) It seems an unreasonable construction that Congress intended that such an inferior officer should be removed for crime only or should hold office for life, and omitted to include other causes applicable to the officer whose tenure appellant considers as controlling. Especially is this true when we consider that commissioners are regarded by the United States courts in the same light as masters in chancery and registers in bankruptcy. If Congress had so intended, and had intended to curtail and limit the judicial power in such a great degree, it would certainly have indicated such intention by enumerating such causes in the act of 1895, or by some other method equally clear and unambiguous.

That such was not the intention of Congress seems to me to be apparent when we examine the tenure of office of a United States commissioner and that of an Arkansas justice of the peace. A justice of the peace in Arkansas is elected by the people and his tenure of office is fixed at two years. These provisions are in both the Arkansas constitution and statutes. He comes strictly within the rule that where an officer is elected or appointed for a fixed term he can not be removed without notice and hearing. By the act of 1895 the judges of the United States court for Indian Territory are vested with the powers conferred upon United States circuit courts to appoint commissioners. Such commissioners hold office at the pleasure of the court only. Congress could not have intended to engraft upon the general law governing such appointments an exception in favor of a few Indian Territory officers then holding appointments, so restrictive of the power of removal as appellant contends for.

NO CAUSE OF REMOVAL BEING PRESCRIBED, THE STATUTE IN THAT REGARD IS INOPERATIVE.

If possible, every word in a statute should have a meaning and be given effect. Yet this rule is limited by another—that a court can not supply a meaning to a defective statute or where there is an omission. The meaning must be derived from the statute itself, and if there has been an omission it is for the legislative body to correct such defect or supply such omission by enactment, not for the court to legislate. Such seems

to be the case with section 4 of the act of 1895. No cause of removal for a commissioner had been prescribed by law, none was prescribed by the statute itself, and there never has been a statutory regulation as contemplated in *Hennan's Case* (13 Peters, 230).

Woodbury & Co. v. *Berry* (18 Ohio St., 456) was on motion to amerce the sheriff of Marion county for failure to levy and return within sixty days an execution issued from the common pleas court of said Marion County. The statute provided generally that any sheriff or other officer guilty of any of the delinquencies enumerated therein may be amerced on motion and "two days notice thereof in writing" (sec. 451), and then, by section 455, provided for an exceptional case, that in the case of "a sheriff or other officer of any county from which the execution issued" such notice should be at least fifteen days.

The court say (Brinkerhoff, J.), page 461:

> "Now, it certainly is difficult, if not impossible, to find any reason why an officer sought to be amerced by motion in the court of his own county should be thus favored in the matter of notice, while, on the other hand, the circumstances of the case to be provided for seem to require that the nonresident officer ought to be thus favored. These considerations, and a comparison of the provisions of these sections of the statute as they stand with those of the statute which was superseded and repealed by the code of civil procedure, not only suggest the conjecture, but convince us of the fact that

> the words *other than the county*, or some equivalent phrase, must have been by accident or oversight of the draftsman of the bill to establish a code of civil procedure, or of the clerk who engrossed it, omitted before the words "from which the execution issued," in section 455. But notwithstanding all this, *ita lex scripta est.* The language as it stands is clear, explicit, and unequivocal. It leaves no room for interpretation, for nothing employed in the language is doubtful. We are satisfied by considerations outside of the language that the legislature intended to enact something very different from what it did enact. But it did not carry out its intention, and we can not take the will for the deed. It is our legitimate function to interpret legislation, but not to supply its omissions.

The appellant does not stand in the defensive position of holding the office until a cause of removal shall be prescribed by law, but the statute in that regard is inoperative, and is deemed to have the force it would have possessed if no limitation had been attempted.

This principle finds a clear exposition in Chaffee's appeal, 56 Mich., 244.

This was a proceeding taken under a statute authorizing the opening, extending, widening, or straightening of streets and alleys in the city of Detroit, and the condemnation of land therefor according to the procedure therein prescribed. The case, as held by the court, was for the purpose of widening an avenue in said city. There was no procedure therein prescribed for widening streets and condemning land therefor.

The court held the statute to that extent to be inoperative. Paragraph 3 of the syllabus of the case is:

> An act which authorizes a municipal body to open and widen streets according to the procedure therein prescribed and then prescribes no procedure for cases of widening streets is to that extent inoperative.

Sherwood, J., in delivering the opinion of the court, says (p. 250):

> I do not find in any section of the act (and there alone it exists if at all) any provision for the assessment or payment of damages and compensation for land taken to widen or straighten a street or alley in the city of Detroit. It is true the oath to be administered to the jury under section 11 requires them to make assessment of one-half the amount awarded against property in the assessment district as established by the council; but they can make such assessment only in cases where the other provisions of the act authorize them to do it, and such authority should be express, and not left to doubtful implication. The first section of the act delegates the power to the city to take private property for the purpose of widening a street and to take proceedings for that purpose provided in the act; but through some oversight the necessary proceedings for that purpose do not seem to have been provided. The right, therefore, to take property to widen a street is not available.
>
> (Page 252): In a statute authorizing these proceedings, or in the proceedings themselves,

> nothing should be left in doubt or uncertainty as to their character or object, or in the means provided for the accomplishment of the object.

In *Baker* v. *Potter* (55 Nebraska, 25) the court hold:

> Where there was an abortive attempt by subsequent legislation to limit the operation of an existing statute, such statute must be deemed to have the force it would have possessed if no limitation of it had been attempted.

This case expresses the doctrine laid down by the text writers and adjudicated cases.

See Dwarris on Stat., page 215; Story, Confl. Laws, 17; Bishop on Written Laws, section 146, and cases cited.

If the words "prescribed by law" in this section are nugatory, the statute is left to read in effect "for cause," without any specification of the causes of removal. The settled rule in this country, as stated in Throop on Public Officers, section 396, is that where the statute gives a power of removal "for cause" without any specification of the causes this power is of a discretionary and judicial nature, and unless the statute otherwise specially provides, the exercise thereof can not be reviewed by any other tribunal with respect either to the cause, or to its sufficiency or existence or otherwise. Even in some cases where the statute specifies the cause of removal, it has been ruled that the removing authority is the sole and exclusive judge of the cause and the sufficiency thereof, and that the courts can not review its decision in any case where it had jurisdiction. (*People ex rel.* v. *Stout*, 11 Abb. Pr.

(N. Y.), 17; S. C., 19 How. Pr. (N. Y.), 171; *People* v. *Bearfield*, 35 Barb., 254; *Patton* v. *Vaughan*, 39 Ark., 211; *People* v. *Hill*, 7 Cal., 97; *City of Hoboken* v. *Gear*, 25 N. J. L., 265; *Smith* v. *Brown*, 59 Cal., 672; *People ex rel.* v. *Higgins*, 15 Ill., 110.)

As no cause of removal is prescribed, and the power of removal is of a discretionary and judicial nature, not subject to review, the letter placed upon record in the United States court by Judge Kilgore was superfluous, as is also the statement of any reason for the removal of the appellant.

NOTICE AND HEARING.

It is not disputed that the American rule is that where causes for removal of an officer are specified in a constitution or by statute, or the term of office is for a fixed period, the officer can not be removed unless notice be given him and he be afforded a hearing. But appellant has made out no such case. And until he has done so the Court of Claims is not subject to his criticism for not giving weight to doctrines which do not obtain in the case at bar. The authorities cited by appellant only sustain the undisputed American rule, where they are applicable at all. They are as follows:

In *Page* v. *Hardin* (8 B. Mon. (Ky.), 648) the governor summarily removed the secretary of the Commonwealth. The constitution of Kentucky (2d Constitution, Art. III, sec. 2) provide that the governor shall be elected for the term of four years. And Article III, section 24, provide that "a secretary shall be

appointed and commissioned during the term for which the governor shall have been elected, if he shall so long behave himself well."

In the language of the decision quoted by the appellant the court say:

> The law, too, prescribes the duties and tenure of the office, and thus furnishes a rule for the decision of the question involved.

In *Dullam* v. *Willson* (53 Mich., 392) the respondent was appointed a trustee of the Michigan Institution for Educating the Deaf and Dumb and the Blind for a term of six years. And the constitution of Michigan provided that the governor could remove for the specific causes mentioned therein only, and upon charges specifying the particular acts or neglect.

In *Commonwealth* v. *Slifer* (25 Pa. St., 23) the adjutant-general of the State militia was summarily removed. He had been commissioned as such officer for a term of three years.

In *State* v. *St. Louis* (90 Mo., 19) a police justice of the city of St. Louis had been removed. His term of office was fixed at four years.

In *Meade* v. *Deputy Marshal* (1 Brock., 324) the petitioner was taken and held in custody for nonpayment of a fine assessed against him by the sentence of a court-martial without notice or hearing. The court held such a sentence to be void, and that under the laws of Virginia the assessment of a fine or trial of a militiaman not in actual service is performed by a court of inquiry, and a second court of inquiry must sit to re-

ceive excuses before the sentence becomes final or can be executed.

It might be a sufficient answer to the English cases cited by appellant to recall to the court that removal at the will of the appointing power is a doctrine that has grown up in American courts, that at common law it did not exist (Throop, Pub. Officers, sec. 362), and that the tenure of office in England is generally held by prescription or other fixed tenure. Yet, tested by the American rule, they will be found to specify causes for removal.

In *Queen* v. *Archbishop of Canterbury* (1 El. & El., 545) the statute (sec. 98 of 1 and 2 Vict., c. 106) enacts "that the bishop shall have power, after having given to the curate sufficient opportunity of showing reason to the contrary," to revoke summarily his license.

The statute also provided for an appeal by the curate to the archbishop. Upon such appeal the archbishop confirmed the revocation of a curate's license without affording him a hearing. Such action of the archbishop was held erroneous, as it well might be, for upon appeal the curate should have been afforded "sufficient opportunity of showing reason to the contrary."

In *Capel* v. *Child* (2 Cromp & Jerv., 558) the statute (57 Geo. III, sec. 50) provided that whenever it shall appear to the satisfaction of any bishop, either of his own knowledge or upon proof by affidavit laid before him, that by reason of the number of churches or chapels in a benefice, the distance of such churches or

chapels, the distance of residence of the spiritual person serving the same, or by his negligence the ecclesiastical duties of such benefice are inadequately performed, the bishop may require the spiritual person serving the same to nominate a curate, and if such person did not, the bishop himself could do so.

This statute prescribes specific causes, and the bishop having nominated without having afforded a hearing upon such causes upon proof of his own knowledge or by affidavit, was held to have acted erroneously.

Williams v. *Bagot* (3 B. & C., 781) was an action of debt where personal service of summons was required. Summons was not served personally upon the defendant, but was left at his place of residence. Judgment was rendered by default against him. The recorder certified up that it was the ancient custom to serve by leaving at the place of residence, but on error judgment was set aside and the custom held to be bad.

OTHER DEFENSES.

Appellant can not recover on principle, but even if he had been removed illegally, his own conduct has precluded him from here claiming for his salary in this action.

Appellant was removed January 31, 1896, by the order of the court (Finding of Fact II). Thereafter he protested that said letter (or order) was insufficient to remove him and served such protest on the judge of the court (Finding III). The petition in this action was filed October 13, 1897, and was amended October 29, 1899. Appellant took no other or further action

to assert his claim to said office or to obtain a reversal of the action of the judge until the institution of this proceeding (Finding VIII). The salary of said office was $1,500 per annum (2d. Suppl. R. S., chap. 145, sec. 4, p. 395). The successors of appellant exercised said office and were paid the salary thereof (Finding IX). Appellant's successors were paid the salary of said office by the disbursing clerk of the Department of Justice, in the absence of any notice or claim on the part of appellant (Finding X).

Viewed in the aspect most favorable to claimant, those who succeeded him to said office were *de facto* officers, at least. They were in possession of the office and exercised its functions under color of appointment by the only body having power to appoint. From February 3, 1896, until October 13, 1897, the commencement of this action, a period of one year and eight months, the appellant permitted the disbursing officer of the Department of Justice to pay to his successors the salary now claimed to be due to him, without other notice, action, or claim than that made to the judge that the order of removal was insufficient to effect such removal.

It seems to be well settled that, in the absence of notice, claim or demand, payment of the salary of an office by a public body to a *de facto* officer is a complete defense to an action by a *de jure* officer for such salary, and that a disbursing officer has the right to rely upon the apparent title of an officer *de facto* and discharge himself and the public body for which he

acts by payment to such officer of the salary or other emoluments of the office.

Smith v. *Mayor*, 37 N. Y., 518; *Terhune* v. *Mayor*, 88 N. Y., 249; *Dolan* v. *Mayor*, 68 N. Y., 274; *McVeany* v. *Mayor*, 80 N. Y., 185; *Auditors, &c.*, v. *Benoit*, 20 Mich., 176; *Scott* v. *Crump*, 106 Mich., 288; *McDonald* v. *Newark*, 58 N. J. L., 12; *State* v. *Milne*, 36 Nebr., 301; *Steubenville* v. *Culp*, 38 Ohio St., 18; *Demarest* v. *Mayor*, 74 Hun., 517; *State* v. *Auditor*, 52 Mo., 518; *Lee* v. *Wilmington*, 1 Marvel (Del.), 65.

L. A. PRADT,
Assistant Attorney-General.

O

Supreme Court of the United States.

No. 239.—October Term, 1900.

William R. Reagan, Appellant,
vs.
The United States.
} Appeal from the Court of Claims.

[May 27, 1901.]

Appellant filed his petition in the Court of Claims October 13, 1897, and an amended petition October 27, 1899, seeking to recover salary as United States Commissioner in the Indian Territory, at the rate of $1,500 per annum, from February 1, 1896, to September 30, 1899, aggregating $5,375.

The findings of fact and conclusion of law were as follows:

"I. The claimant was, on the 25th day of April, 1893, appointed by the United States court for the Indian Territory United States commissioner within said Territory, under the provisions of section 39 of an act of Congress approved May 2, 1890, chapter 182, (1st Suppl. Rev. Stat. 737,) and upon the 1st day of March, 1895, the claimant was one of the present commissioners, then holding office under an existing appointment. On April 17, 1895, the following order was entered of record in the United States court in the Indian Territory, Southern District:

'It appearing from the records of this court that the said William R. Reagan was a duly appointed, qualified, and acting commissioner for the United States court for the Third Judicial Division of the Indian Territory, located at Chickasha, on the 1st day of March, 1895, it is hereby ordered that in accordance with the act of Congress approved March 1, 1895, the said William R. Reagan be, and he is hereby, continued in office, and the bond hereinbefore recited be, and the same is, in all things approved and confirmed. C. B. Kilgore, *Judge.*'

"II. He continuously performed the duties and received the salary of said office until the 31st day of January in the year 1896, when the following letter was entered upon the records of the United States court in the Indian Territory, in the Southern District, by the Hon. Constantine B. Kilgore, judge of said court:

'In Chambers,
Ardmore, Indian Territory, *January* 31*st*, 1896.

'Hon. William R. Reagan, United States commissioner for the fourth commissioner's district in and for the southern district of the Indian Territory.

'Sir: I feel it my duty to declare the office of commissioner in that district vacant and to notify you that you are no longer United States commissioner for that district, and your successor will be named at once.

'There are many reasons which I could assign for my action in this behalf, but I will only suggest one now, that is, your age and the infirmities incident thereto render you, in my judgment, in many respects unfit for the office.

'Very respectfully, your obedient servant, C. B. KILGORE,
Judge U. S. Dist. Court, S. Dist.'

"The letter was not sent to the claimant or served upon him. No other statement of cause was made. The claimant was given no notice of any charge against him. No hearing was allowed the claimant and no opportunity to submit proof in his defense.

"III. The claimant protested that said letter was insufficient to effect his removal, and duly served such protest upon the Hon. Constantine B. Kilgore, judge of said court.

"IV. On February 10, 1896, one John R. Williams, who had been designated by said judge as United States commissioner in the claimant's place, came to claimant's office with two armed deputy marshals, and, presenting his order of appointment, demanded possession of the dockets, books, and papers belonging to claimant's office as United States commissioner.

"V. The order of appointment of said Williams is as follows:

'IN CHAMBERS,
ARDMORE, INDIAN TERRITORY, *January* 31*st*, 1896.

'John R. Williams, a resident of Ryan, Southern District of Indian Territory, is hereby appointed United States commissioner in and for the Fourth District of the Southern District of the Indian Territory.

'Said appointment to take effect at once.

'It is further ordered that said commissioner shall reside at Ryan, and that he shall hold court at Ryan and at the town of Duncan in said district until further ordered, the time to be divided so as to dispose of the business at both points, which time shall be determined upon hereafter.

C. B. KILGORE,
Judge U. S. Ct., So. Dist.'

"VI. The claimant protested and refused to recognize said Williams as his successor in said office, excepting so far as he was compelled thereto by the exercise of superior force on the part of the deputy marshals aforesaid and said Williams. Thereupon the claimant and said Williams joined in the following instrument of writing:

'DUNCAN, INDIAN TERRITORY, }
Southern District. }

'This instrument of writing witnesseth:

'That whereas C. B. Kilgore, judge of the United States court for the Southern District of the Indian Territory, on the 31st day of January, A. D. 1896, made, and caused to be entered upon the docket of his court at Ardmore, Indian Territory, an order declaring my office of United States commissioner for the Ryan division of said district vacant; and at the same time appointing John R. Williams to be my successor in said office, and the said Reagan having appealed to the courts of the United States from said order, on the ground that said order is contrary to the law:

'Now, therefore, it is agreed by and between the parties hereto that said Reagan will turn over and surrender the dockets, books, and papers belonging to said office under protest, and that said Williams receives the same with the understanding that said Reagan yields no rights by so doing that he would otherwise have.

'Witness our hands this 10th day of February, A. D. 1896.

JNO. R. WILLIAMS.
WM. R. REAGAN.'

"VII. The claimant received a salary of $1,500 per annum up to the 3rd day of February, 1896, but since that date has not been paid said salary or any part thereof.

"VIII. Claimant took no other or further action to assert his claim to said office or to obtain a reversal of the action of Judge Kilgore until the institution of this proceeding.

"IX. From the 3rd day of February, 1896, until the 7th day of October, 1897, John R. Williams, who was appointed by Judge Kilgore to said office in claimant's stead, exercised said office and was paid the salary thereof. On said date one Horace M. Wolverton was appointed as the successor of said John R. Williams by Hon. Hosea Townsend, United States judge for said district, and since that time has exercised said office and has been paid the salary thereof.

"X. From the 3rd day of February, 1896, until the commencement of this action, the disbursing clerk of the Department of Justice paid to the persons who succeeded claimant to said office the salary of said office in the absence of any notice on the part of claimant that he claimed to be lawfully entitled to said office and the salary thereof, or any claim or demand on the part of claimant for the payment to him of such salary for said period of time or any part thereof.

Conclusion of Law.

"Upon the foregoing findings of fact, the court decide, as a conclusion of law, that the petition be dismissed."

Judgment was thereupon rendered dismissing the petition, and the case was brought to this court by appeal. The opinion below is reported 35 Ct. Cl. 90.

Mr. Chief Justice FULLER delivered the opinion of the Court:

Section 39 of the act of May 2, 1890, (26 Stat. 98, c. 182,) provided:

"That the United States court in the Indian Territory shall have all the powers of the United States Circuit Courts or Circuit Court judges to appoint commissioners within said Indian Territory, who shall be learned in the law, and shall be known as United States commissioners; but not exceeding three commissioners shall be appointed for any one division, and such commissioners when appointed shall have, within the district to be designated in the order appointing them, all the powers of commissioners of Circuit Courts of the United States.

"They shall be ex officio notaries public, and shall have power to solemnize marriages.

"The provisions of chapter ninety-one of the said laws of Arkansas, regulating the jurisdiction and procedure before justices of the peace, are

hereby extended over the Indian Territory; and said commissioners shall exercise all the powers conferred by the laws of Arkansas upon justices of the peace within their districts; but they shall have no jurisdiction to try any cause where the value of the thing or the amount in controversy exceeds one hundred dollars."

The act of March 1, 1895, (28 Stat. 695, c. 145,) provided for additional judges of the court, and by section 4:

"That each judge of said court shall have the powers conferred by law upon the United States Circuit Courts to appoint commissioners within the district in which he presides, who, at the time of their appointment, shall be duly enrolled attorneys of some court of record of the United States or of some State, and shall be competent and of good standing, and shall be known as United States commissioners, but not exceeding six commissioners shall be appointed for any district hereinbefore constituted:

"*Provided*, That the present commissioners shall be included in that number and shall hold office under their existing appointments, subject to removal by the judge of the district where said commissioners reside, for causes prescribed by law. The judge for each district may fix the place where, or the time when, each commissioner shall hold his regular terms of court.

"The order appointing such commissioners shall be in writing and shall be spread upon the records of one of the courts of the district for which they are appointed; and such order shall designate, by metes and bounds, the portion of the district for which they are appointed. They shall have all the powers of commissioners of the Circuit Courts of the United States.

"They shall be ex officio notaries public and ex officio justices of the peace within and for the portion of the district for which they are appointed, and shall have the power as such to solemnize marriages."

Appellant was appointed a commissioner April 25, 1893, and was such on March 1, 1895. In view of the proviso he was continued in office until January 31, 1896, when he was removed by the judge of the district where he resided, and another person appointed.

He now contends that the removal was void, because the cause assigned for the action of the judge was not a "cause prescribed by law," and because he was given no notice of any charge against him, and no hearing, contrary to the statute.

The commissioners appointed by the judges of the United States Court in the Indian Territory are inferior officers, not holding their offices for life, or by any fixed tenure, and they fall within the settled rule that the power of removal is incident to the power of appointment. *Ex parte Hennen*, 13 Pet. 230, 258; *Parsons* v. *United States*, 167 U. S. 324. But it is assumed that because of the language of the proviso, commissioners appointed by the court prior to March 1, 1895, formed an exceptional class from commissioners appointed by the judges of that court after that date, and hold office until they are removed for causes prescribed by existing law, or until Congress passes a law defining such causes. The latter view

may be rejected at once, for the words "causes prescribed by law," manifestly relate to causes prescribed when the act was approved, or at least when the removal was made. Not only is there nothing here to give them any other meaning, but it cannot be presumed that Congress intended to forbid the exercise by the judges of their power in the matter of these appointments in the instance of these particular commissioners, or to provide that they should hold office during life, or until Congress should specify causes subjecting them to removal, while all other commissioners were removable at the will of the power appointing them.

The proviso was enacted apparently out of abundant caution lest the legislation in respect of the United States Court in the Indian Territory might operate in itself to turn the then commissioners out of office, and if Congress had intended in addition that they should hold office free from the rule applicable to others, we think that the intention would have been plainly expressed.

The inquiry is therefore whether there were any causes of removal prescribed by law, March 1, 1895, or at the time of the removal. If there were, then the rule would apply that where causes of removal are specified by constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential. If there were not, the appointing power could remove at pleasure or for such cause as it deemed sufficient.

The suggestion that the proviso refers to such causes as courts might recognize as just will not do, for "prescribed by law" is prescribed by legislative act, and removal for cause, when causes are not defined nor removal for cause provided for, is a matter of discretion and not reviewable.

It does not appear that any causes for removal of these court officers were ever affirmatively specified by Congress; but it is said that Congress had prescribed such causes by the adoption in the Indian Territory of certain laws of Arkansas. By section thirty-one of the act of May 2, 1890, some of those laws were put in force in the Indian Territory, and by section thirty-nine the commissioners were authorized to exercise all the powers conferred by the laws of Arkansas on justices of the peace within their districts, and the provisions of chapter ninety-one of those laws regulating the jurisdiction of and procedure before justices of the peace were extended to that Territory. By the act of March 1, 1895, these were reenacted, and chapters forty-five and forty-six of Mansfield's Digest, treating of criminal law and criminal procedure, were also put in force there.

The argument is that the effect of these provisions was to put the commissioners in the place of justices of the peace in Arkansas, and that consequently the causes prescribed by law for the removal of justices of the peace must be taken as prescribed by law as causes for the removal of commissioners.

In our opinion this conclusion does not follow. In order to clothe the commissioners with the powers pertaining to justices of the peace, this was

conveniently accomplished by reference, but that did not convert these officers of the United States Court in the Indian Territory into justices of the peace or change the relations between them and the judges of that court. Justices of the peace in Arkansas by State constitution and laws hold office for two years, and cannot be removed except for cause, and on notice and hearing. The commissioners hold office neither for life, nor for any specified time, and are within the rule which treats the power of removal as incident to the power of appointment, unless otherwise provided. By chapters forty-five and forty-six, justices of the peace on conviction of the offences enumerated are removable from office, but these necessarily do not include all causes which might render the removal of commissioners necessary or advisable. Congress did not provide for the removal of commissioners for the causes for which justices of the peace might be removed, and if this were to be ruled otherwise by construction, the effect would be to hold the commissioners in office for life unless some of those specially enumerated causes became applicable to them.

We agree with the Court of Claims that this would be a most unreasonable construction and would restrict the power of removal in a manner which there is nothing in the case to indicate could have been contemplated by Congress.

If causes of removal had been prescribed by law before the removal of appellant that would have presented a different question, but as there were then none such, the proviso did not operate to take him out of the rule expounded in *Ex parte Hennen*, and the mere fact that in that particular this part of the proviso was inoperative as to him did not change the result.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.